No. 92-2010 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

Supreme Court, U.S.
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AT&T FAMILY FEDERAL CREDIT UNION AND CREDIT UNION NATIONAL ASSOCIATION, INC.,
Petitioners,

v.

FIRST NATIONAL BANK & TRUST CO., *et al.*,
Respondents.

On Petition for Writ of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

BRIEF OF NONFEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether banks (and their trade association) that compete for customers and business against AT&T Family Federal Credit Union have standing to challenge decisions of the National Credit Union Administration permitting AT&T Family Federal Credit Union to expand its membership in violation of the express "common bond" requirement of the Federal Credit Union Act?

LIST OF PARTIES

The parties below were as follows:

The First National Bank and Trust Company, plaintiff in the district court and appellant below, is a nationally chartered bank headquartered in Asheboro, North Carolina.

Lexington State Bank, plaintiff in the district court and appellant below, is a state chartered bank headquartered in Lexington, North Carolina.

Randolph Bank and Trust Company, plaintiff in the district court and appellant below, is a state chartered bank headquartered in Asheboro, North Carolina.

Bankers Trust of North Carolina, plaintiff in the district court and appellant below, is a state chartered bank headquartered in Greensboro, North Carolina.

Piedmont State Bank, plaintiff in the district court and appellant below, formerly a state chartered bank headquartered in Greensboro, North Carolina, merged with Bankers Trust of North Carolina on July 15, 1992, and no longer exists as a legal entity. Bankers Trust of North Carolina is the surviving entity.

American Bankers Association, plaintiff in the district court and appellant below, is a trade association for the commercial banking industry.[1]

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[1] Pursuant to Rule 29.1, the nonfederal respondents' listing of parent companies and subsidiaries (except wholly-owned subsidiaries) is as follows:

The parent company of respondent First National Bank and Trust Company is FNB Corp. The parent company of respondent Lexington State Bank is LSB Bancshares, Inc. Respondent Randolph Bank and Trust Company has no parent; Corporate Data

Petitioners AT&T Family Federal Credit Union and Credit Union National Association, Inc., were permitted to intervene as defendants in the district court and were appellees below.

The North Carolina Alliance of Community Financial Institutions, a trade association representing community financial institutions in North Carolina, filed a brief amicus curiae below, urging reversal of the decision of the district court's judgment.

The National Credit Union Administration, defendant in the district court and appellee below, is the agency charged with the administration and enforcement of the Federal Credit Union Act.

Services, Inc. is its only subsidiary (other than wholly-owned subsidiaries). The parent company of respondent Bankers Trust of North Carolina is BTNC Corp.; DataBank, Inc. is its only subsidiary (other than wholly-owned subsidiaries). Respondent American Bankers Association has no parent companies or subsidiaries (other than wholly-owned subsidiaries).

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BRIEF OF NONFEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-15a, is reported at 988 F.2d 1272. The opinion of the district court, Pet. App. 16a-25a, is reported at 772 F. Supp. 609.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 1993. The petition for a writ of certiorari

was filed on June 21, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTES AND REGULATIONS

The relevant portions of the texts of the following statutes and regulations are set forth in the Appendix, *see* App. 1a-2a:

1. The Administrative Procedure Act, 5 U.S.C. § 702.
2. The "common bond" limitation of the Federal Credit Union Act, 12 U.S.C. § 1759.
3. Interpretive Ruling & Policy Statement 89-1—Chartering and Field of Membership Policy, 54 Fed. Reg. 31,165 (NCUA 1989).

STATEMENT

This case involves a straightforward application of decisions of this Court under which competitors of a regulated entity have standing to challenge regulatory action that permits the regulated entity to expand beyond the bounds set by Congress. *E.g.*, *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388 (1987); *Investment Co. Inst. v. Camp*, 401 U.S. 617 (1971) ("ICI").

Plaintiffs are banks (and their trade association) that compete for business against a large, multi-state credit union called AT&T Family Federal Credit Union ("AT&T Credit"). On the merits—which have not yet been reached—the issue is whether the approval by the National Credit Union Administration ("NCUA") of numerous expansions of AT&T Credit's "field of membership" violated the "common bond" restriction in the Federal Credit Union Act ("FCUA").

The district court dismissed the complaint for lack of standing. The D.C. Circuit reversed in a unanimous decision (Judges Wald, Silberman and D.H. Ginsburg) based on *Clarke* and other competitor standing decisions of this Court. Certiorari has been sought solely by intervenor AT&T Credit and its trade association. The Solicitor General, representing defendant NCUA, has not sought certiorari.

Background. Credit unions take federally insured deposits from and make consumer and mortgage loans to their members. These activities compete with banks. Congress granted credit unions specific competitive advantages as compared to banks: for example, credit unions are tax-exempt, 12 U.S.C. § 1768, and are not restricted by the geographic limitations on branch banking. But Congress also specifically limited membership in a federal credit union to "groups having a common bond of occupation or association." 12 U.S.C. § 1759. The "common bond" limitation constrains the competitive scope of every federal credit union, because a credit union can generally take deposits from and make loans only to its members. 12 U.S.C. § 1757(5), (6).

Until recently, AT&T Credit's field of membership was limited to a small number of related employees. In recent years, however, AT&T Credit has requested approval by the NCUA of the addition to its field of membership of numerous employee groups spread over a wide geographic area who admittedly have *no* "common bond" with the core AT&T employee groups or to one another.[2] NCUA's current chartering policy

[2] Before a credit union may begin operating it must submit an "organization certificate" to the National Credit Union

permits a federal credit union to "consist of a combination of distinct, definable occupational and/or associational groups", even though the result is a credit union whose members do not share a single "common bond." *Interpretive Ruling and Policy Statement 89-1—Chartering and Field of Membership Policy*, 54 Fed. Reg. 31,165, 31,170 (NCUA 1989), App. 2a. Following this policy, the NCUA has approved almost all of AT&T Credit's proposals to add new members who have no relationship to the existing members, and has not denied any such proposal based on the "common bond" requirement. Through these licensing decisions, we contend, the NCUA has essentially nullified the statutory common bond requirement.[3]

This Lawsuit. AT&T Credit's size and tax-exemption make it a formidable competitor, and it takes customers and business away from the banks that have to compete against it. Accordingly, five local banks that compete against AT&T Credit and their trade association brought this action against the NCUA challenging the NCUA's interpretation of the

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Administration stating, *inter alia*, "the proposed field of membership, specified in detail." 12 U.S.C. § 1753(5). A credit union may not begin operating until its organization certificate has been approved by the NCUA. 12 U.S.C. § 1754. Any amendment to a credit union's organization certificate, including to its field of membership, likewise requires NCUA approval. *See* 12 U.S.C. §§ 1753, 1754.

[3] AT&T Credit has enjoyed exponential membership growth in recent years. AT&T Credit has over 60,000 members and has assets in excess of $237 million. NCUA, Region III Div. of Ins. Field of Membership Checklist re AT&T Credit (July 31, 1990) (attached as Exhibit 11 to the Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment filed February 5, 1991 in the district court).

common bond requirement and NCUA's decisions to permit AT&T Credit to expand its field of membership to include persons who do not have a common bond with one another.

The district court dismissed the complaint without reaching the merits. It held that the banks and their trade association did not have "prudential" standing to challenge NCUA's unlawful actions. Pet. App. at 25a.[4]

The court of appeals reversed and remanded for further proceedings in a unanimous decision. It noted that the common bond provision was designed to protect credit union members by ensuring that those making lending decisions would be familiar with the borrowers, with whom they had a common bond, and borrowers would in turn be reluctant to default. The plaintiff banks, said the court, have standing as competitors to maintain the action because the interest they are pursuing—confining credit union membership to those sharing a common bond—is congruent with the interests protected by the common bond requirement. Pet. App. at 9a, 12a-13a.

The court of appeals' conclusion that plaintiffs have standing flowed inevitably from its review of *ICI* and *Clarke*. Indeed, it said, "the parallels between those cases and the present one are striking." Pet. App. at 8a. *ICI* and *Clarke*, the court of appeals concluded, establish that "a plaintiff who has a competitive interest in confining a regulated industry within certain congressionally imposed limitations may sue to prevent the alleged loosening of those restrictions, even

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[4] The banks' constitutional standing is not at issue. *See* Pet. App. at 19a n.1, 5a.

if the plaintiff's interest is not precisely the one that Congress sought to protect." Pet. App. at 9a. Applying that principle here, the court found that the common bond requirement "limit[ed] a credit union's customer base," just like the "entry restrictions" involved in *ICI* and *Clarke*. *Id.* Therefore, the plaintiff banks (and their trade association) as competitors of AT&T Credit injured by the expansion of AT&T Credit in violation of the statutory limitation had standing to challenge the NCUA's actions. Pet. App. at 12a-13a.

ARGUMENT

I. THE COURT OF APPEALS' DECISION WAS A STRAIGHTFORWARD AND CORRECT APPLICATION OF THE COMPETITOR STANDING DECISIONS OF THIS COURT.

The Administrative Procedure Act grants standing to persons "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. Under *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 153 (1970) ("*ADPSO*"), a party meets this standard if "apart from the 'case' or 'controversy' test, . . . the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute . . . in question." Applying the "zone of interests" test, this Court has squarely and repeatedly held that competitors have standing to enforce statutory limitations on the scope of the activities of regulated entities. *See Clarke v. Securities Indus. Ass'n*, 479 U.S. 388 (1987); *Investment Co. Inst. v. Camp*, 401 U.S. 617 (1971); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970). Indeed, in *ADPSO* itself, the Court held that data processors "as competitors

of national banks" had standing to challenge a decision of the Comptroller of the Currency permitting national banks to provide data processing services, allegedly in violation of limits prescribed in the banking laws. 397 U.S. at 157.

The court of appeals correctly applied these decisions to the present case. Banks compete for business with credit unions, and the plaintiff banks lost business when AT&T Credit was permitted to expand its membership to persons who have no common bond with its existing members. As competitors of the regulated entity the plaintiff banks and their trade association have standing to challenge as unlawful the decisions of the NCUA that have resulted in competitive injury.

As the court of appeals found, "the parallels between [the *ICI* and *Clarke*] cases and the present one are striking." Pet. App. at 8a. In *ICI*, an association of mutual fund companies challenged the Comptroller of the Currency's approval of First National City Bank's application to establish and operate a collective investment fund for managing agency accounts. ICI's challenge was based on the Glass-Steagall Act, which benefited banks by prohibiting securities firms from taking deposits, but which also contained a limitation on the securities activities of banks. 12 U.S.C. §§ 24 (Seventh), 378(a). The Court held that mutual fund providers had standing to sue the Comptroller to enforce a limitation on the extent to which banks could enter the investment company business. 401 U.S. at 620-21. Here, similarly, the banks have standing because, as the court of appeals said, the common bond requirement in the FCUA limits "a credit union's

customer base" and thus the extent to which it may lawfully compete with banks. Pet. App. at 9a.

Clarke involved a challenge by investment firms to a decision of the Comptroller permitting banks to establish discount brokerage offices anywhere in the country, notwithstanding the limitations on branch banking in the McFadden Act, 12 U.S.C. §§ 36, 81. That Act, of course, "was designed . . . to protect smaller banks from competition from out-of-state leviathans, not to protect investment bankers." Pet. App. at 8a (citation omitted). Nonetheless, this Court held that the investment firms in *Clarke*, as competitors injured by the Comptroller's decision, had standing to sue the Comptroller for permitting banks to open out-of-state offices that allegedly violated the McFadden Act. 479 U.S. at 403.

Clarke is indistinguishable from the present case. Like the branch banking limits at issue in *Clarke*, the statutory common bond requirement at issue here restricts the extent to which the regulated entity may expand the marketplace for its services. Like the securities firms who were the plaintiffs in *Clarke*, the banks who are the plaintiffs here compete with the regulated entity and are injured by the regulatory decision they brought suit to challenge. And, contrary to AT&T Credit's bald assertion, Pet. at 11, it is just as clear here as it was in *Clarke* that Congress intended "to limit the competitive reach of the regulated entit[y]." The FCUA expressly states that the membership (and thus the customers) of every federal credit union "*shall be limited*" to those having a common bond with one another. 12 U.S.C. § 1759 (emphasis added).

AT&T Credit's principal argument (Pet. at 7) is that a competitor has standing only if it can show that Congress had an "intent to benefit" the plaintiff. But nothing in this Court's decisions requires a court to look beyond the limitations imposed by the statutory language to search for subjective congressional motivations. To the contrary, this Court rejected exactly this argument in *Clarke* when it pointed out that in *ICI* and the other competitor standing cases

> there was no evidence that Congress had intended to benefit the plaintiff's class [*e.g.*, mutual fund providers in *ICI*] when it limited the activities permitted national banks. . . . [I]t was enough to provide standing that Congress, for its own reasons . . . had forbidden banks to compete with plaintiffs by entering the investment company business.

479 U.S. at 398.

The Court went on in *Clarke* to summarize the "zone of interest" test as *not* requiring any "indication of congressional purpose to benefit the would-be plaintiff." 479 U.S. at 399-400.[5]

This Court's decision in *Air Courier Conference of America v. American Postal Workers Union, AFL-CIO*, 498 U.S. 517 (1991), is fully consistent with the court of appeals' decision. *Air Courier* was not a

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[5] AT&T Credit wrongly suggests that the D.C. Circuit recognized that the general purpose of the FCUA was to encourage the "growth" of credit unions. Pet. at 13. The court actually stated that Congress' purpose was to encourage the "proliferation" of credit unions. Pet. App. at 6a. The *proliferation* of credit unions, of course, will be a natural byproduct of the enforcement of the common bond requirement.

competitor standing case at all; rather, it involved the question whether a union had standing to sue the Postal Service for adopting a rule that the union claimed was unlawful and reduced employment opportunities for the union's members. There is no indication that this Court by reviewing carefully the language and purpose and history of the Private Express Statute intended in any way to overrule or modify the competitor standing cases or engraft onto them a requirement that a competitor show a subjective congressional intent to confer standing on it (*see* Pet. at 9). To the contrary, *Air Courier* expressly stated that "*Clarke* is the most recent in a series of cases in which we have held that *competitors of regulated entities have standing to challenge regulations.*" 498 U.S. at 529 (emphasis added). That is exactly what the D.C. Circuit here held.

II. THERE IS NO REASON TO GRANT CERTIORARI

The Solicitor General has not sought certiorari on behalf of defendant NCUA. None of intervenor AT&T Credit's remaining arguments justify granting certiorari.

1. There is no conflict in the circuits requiring resolution by this Court. The Fourth Circuit did hold in *Branch Bank & Trust Co. v. NCUA*, 786 F.2d 621 (4th Cir. 1986), *cert. denied*, 479 U.S. 1063 (1987), that a bank did not have standing to challenge a decision of the NCUA approving expansion of a credit union in violation of the common bond requirement. But that case was decided before *Clarke*, and, as the D.C. Circuit said, Pet. App. at 9a n.3, *Branch Bank* cannot survive *Clarke*. *Branch Bank* was part of a line of cases that limited standing to express beneficiaries of a statutory restriction. This whole line of

cases—including a D.C. Circuit case, *Control Data Corp. v. Baldridge*, 655 F.2d 283, *cert. denied*, 454 U.S. 881 (1981), that the Fourth Circuit cited in *Branch Bank*, 786 F.2d at 625—was expressly overruled in *Clarke*. 479 U.S. at 400 n.15. And, as noted above, *Clarke* was quite explicit that, contrary to what the Fourth Circuit had held in *Branch Bank*, "there need be no indication of congressional purpose to benefit the would-be plaintiff." *Id.* at 399-400.

The Fourth Circuit has not cited *Branch Bank* since *Clarke* was decided, nor has it had occasion to consider whether in light of *Clarke* it would now follow or reject the D.C. Circuit's decision in the instant case. Under these circumstances, and given the clarity of the holding in *Clarke* and its effect on *Branch Bank*, there is no reason to believe there is a live conflict in the circuits.

2. There is no "confusion" in the courts about the application of *ICI*, *Clarke*, and the other competitor standing cases, either in general or as applied to suits against the NCUA in particular. Indeed, AT&T Credit does not cite a single post-*Clarke* case in which a competitor has been denied standing to challenge agency action expanding the authority of a regulated entity.[6]

3. The prediction of disruption of NCUA's programs, Pet. at 16-17, is no reason to grant certiorari.

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[6] In the one "common bond" case of which we are aware since the D.C. Circuit decision here, a district court in Michigan held that the plaintiff banks *did* have standing to sue the NCUA, following the D.C. Circuit and rejecting the NCUA's reliance on the Fourth Circuit's decision in *Branch Bank*. *Community First Bank v. NCUA*, No. 5:93-cv-59, slip op. at 7-8 (W.D. Mich. June 25, 1993).

Other federal agencies—including the banking agencies such as the Comptroller of the Currency, which was the defendant in *ADPSO*, *ICI*, and *Clarke*, among others—face the possibility of competitor standing suits without any evidence that their ability to carry out their regulatory responsibilities has been impaired. NCUA is certainly capable of doing the same thing.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

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5 U.S.C. § 702:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

12 U.S.C. § 1759:

Federal credit union membership shall consist of the incorporators and such other persons and incorporated and unincorporated organizations, to the extent permitted by rules and regulations prescribed by the Board, as may be elected to membership and as such shall each, subscribe to at least one share of its stock and pay the initial installment thereon and a uniform entrance fee if required by the board of directors; except that Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district.

Shares may be issued in joint tenancy with right of survivorship with any persons designated by the credit union member, but no joint tenant shall be permitted to vote, obtain loans, or hold office, unless he is within the field of membership and is a qualified member.

54 Fed. Reg. 31,165, 31,170 (1989):

4. *Multiple-Group Charters.* NCUA may charter a Federal credit union to serve a combination of distinct, definable occupational and/or associational groups. However, NCUA will not charter as a single Federal credit union multiple groups which include one based on a community common bond.

In addition to general chartering requirements, special requirements pertaining to multiple-group applications must be satisfied before NCUA will grant such a charter.

a. Each group to be included in the proposed field of membership of the Federal credit union must have its own common bond.

. . .

An example of a multiple-group field of membership is:

"The field of membership of this Federal credit union shall be limited to those having the following common bond:

1. Employees of DuPont Corp. who work in Wilmington, Delaware:

2. Partners and employees of the law firm of Smith & Jones who work in Wilmington, Delaware:

3. Members of the GHI Associations who live in Wilmington, Delaware, and qualify for membership in accordance with its constitution and bylaws.